

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**AVINOAM DAMTI,**

**Plaintiff,**

**v.**

**Civil Action No. 2:07cv28**

**OFFICER GONZALES, OFFICER MURPHY,  
OFFICER PHELPS, OFFICER CURRAS, OFFICER  
R. WILSON, OFFICER VERONICA FERNANDEZ,  
OFFICER WILLIAM LAYHUE, OFFICER R. TRYBUS,  
OFFICER YOUNG, OFFICER LEISURE, OFFICER GARCIA,  
CAROL KONCHAN, WARDEN AL HAYNES,  
DOMINIC GUTIERREZ, SR., SUSAN S. McCLINTOCK,  
DR. WATERS, ADMINISTRATOR BRESKOACH,  
MARTHA BLANCO, KIM WHITE, HARRELL WATTS,  
CAPT. OF USP HAZELTON, OFFICER GRADISKA,**

**Defendants.**

**ORDER**

It will be recalled that on March 24, 2009, Magistrate Judge Kaull filed his Report and Recommendation, wherein the Plaintiff was directed, in accordance with 28 U.S.C. § 636(b)(1), to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation. On April 6, 2009, Plaintiff filed his Objections to Magistrate's Report and Recommendation.

Upon examination of the report from the Magistrate Judge, it appears to the Court that the issues raised by the Plaintiff in his Complaint, brought pursuant to Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), wherein Plaintiff alleges that he was improperly placed to work among high security prisoners, that he was injured by an inmate while there, and that he is being denied medical care, were thoroughly considered by Magistrate Judge Kaull in his Report and

Recommendation, as were the issues raised by Defendants in their Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. It will be recalled that by Order entered on May 30, 2008, this Court dismissed with prejudice Defendants Wilson, Fernandez, Garcia, Layhue, Trybus, Gutierrez, McClintock, White, Watts, Konchan, Brescoach, Waters and Blanco, and dismissed the Plaintiff's claim of deliberate indifference to serious medical needs. Thus, the only claims remaining and addressed in the Magistrate's Report and Recommendation are the Plaintiff's Eighth Amendment claims against Defendants Gonzalez, Murphy, Phelps, Curras, Young, Leisure, Haynes, Captain of Hazelton and Gradiska for failure to protect.

Upon review of the Plaintiff's objections, the Court finds that the Plaintiff has not raised any issues that were not already thoroughly considered and addressed by the Magistrate Judge in his Report and Recommendation. Moreover, the Court, upon an independent de novo consideration of all matters now before it, is of the opinion that the Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in this action. Therefore, it is

**ORDERED** that Magistrate Judge Kaul's Report and Recommendation be, and the same hereby is, accepted in whole and that this civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

**ORDERED** that the Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (docket #44) shall be, and the same is hereby, **GRANTED in part** and to the extent that it seeks the dismissal of this case for failure to exhaust. In all other respects, Defendants' Motion shall be, and the same is hereby, **DENIED** as the Court is without jurisdiction to consider the additional arguments made therein. It is further

**ORDERED** that the Plaintiff's remaining claims against the remaining Defendants shall be, and the same are hereby, **DISMISSED with prejudice** for failure to exhaust. It is further

**ORDERED** that the above-styled action shall be **STRICKEN** from the docket of this Court. It is further

**ORDERED** that the Clerk shall enter judgment for the Defendants. It is further

**ORDERED** that, if Plaintiff should desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within thirty (30) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, Plaintiff may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed in forma pauperis from the United States Court of Appeals for the Fourth Circuit.

**ENTER:** April 17<sup>th</sup>, 2009

/s/ Robert E. Maxwell  
United States District Judge